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No. 02-384

Supreme Court, U.S.
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In The

Supreme Court of the United States

ALLEN BLACKTHORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITIONER BLACKTHORNE'S REPLY BRIEF

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Pursuant to Rule 15.6, Rules of the Supreme Court, Petitioner submits this his Reply Brief in response to the Respondent United States' Brief in Opposition [hereinafter cited as GovtBr.], and would show the following:

1. Factual Errors in Respondent's Brief.

Respondent asserts that in 1997 Blackthorne agreed to pay Daniel Rocha $4,000.00 to procure an assault on Sheila Bellush, and gave Rocha the money along with a photograph of Bellush and her home address in Boerne, Texas. GovtBr. at 3. Respondent's straightforward description belies a record and Government case that are far from clear. It is evident that the Government elicited the false testimony from Gonzales about seeing Bellush in her backyard in Boerne, in order to corroborate Rocha's totally unsubstantiated claims that he received photographs of Bellush from Blackthorne.[1] Rocha's and Gonzales' statements about the amount of money, the timing and manner of alleged remuneration from Blackthorne, and the photographs were very inconsistent. At one point, Rocha alleged Blackthorne promised him 25 percent of a golf course he was going to build, at another a $400,000 loan to acquire a sports bar, and finally $4,000 to beat Bellush with a $10,000 incentive if, as a result of the assault, Blackthorne regained custody of his daughters (a legal impossibility). 21R135-137. Rocha once claimed that Blackthorne gave him $4,000 cash, and on another occasion he claimed two

[1] Rocha was a self-admitted bookie, hustler, tax-evader, money-launderer, suborner-of-perjury, and wholesale liar. He admitted 119 times to having lied to law enforcement, friends, family and reporters regarding his involvement in the murder of Bellush during his direct and cross-examination, based on a count performed by the undersigned, and on 35 different topics according to the Government. 5R1138-39. He was the only one of the three (Rocha, Gonzalez and Del Toro) who ever spoke to or met Blackthorne.

checks and cash totaling $11,000. 17R23; 17R31.[2] Finally, Rocha testified that Blackthorne gave him one photo of Bellush, which he gave to Gonzales. 16R99-103. Gonzales, who never met Blackthorne, claimed that Rocha gave him two photos of Bellush. 21R253-57. Gonzales gave varying accounts of how he disposed of the alleged photo(s): either by tossing them out the window of his car or by burning them. 24R277. The Government otherwise produced no direct evidence corroborating any of Rocha's claims about these subjects.

Respondent's assertion that Gonzales testified to having seen a woman he "believed to be Bellush" is a blatant misstatement of the record. GovtBr. at 3. Having informed Gonzales prior to his testimony on direct examination that he could not have seen Bellush, the Government nevertheless elicited and did not correct Gonzales' testimony that he had seen Bellush in Boerne (not that he "believed" that he had seen her). 21R82-88; 21R278. Corroboration of Rocha was essential, and the Government's means were to knowingly introduce perjury and use that perjury during final argument.

Respondent's assertion that Bellush was "in Florida seeking to relocate her family to that state to get away from petitioner" is not supported by the record. GovtBr. at 3. Jaime Bellush (Sheila's husband) testified that the family moved to Florida because he received a job promotion and Sheila had been arrested in Texas for beating one of her children (Daryl). 15R163ff. He added that once Blackthorne voluntarily relinquished his parental rights

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[2] Rocha claimed that on September 10 or 11, 1997, Blackthorne provided payment, the Boerne address, and the photo so that Gonzales and Del Toro could assault Sheila in Boerne. However, it was uncontradicted that Blackthorne knew that Bellush had moved to Florida on September 6, 1997, because he alerted Sheila's bond company to that fact on September 6. *See* GovtEx. 1004 (tape); GovtEx. 1005A&B (transcription of two calls from Blackthorne on September 6).

in July 1997, they had the legal ability to move out of Texas. *Id.*

Respondent states that Sheila Bellush lost custody of one of her daughters in 1997. GovtBr. at 4. Custody was not lost to Blackthorne, as this statement might suggest. Rather, after being beaten by her mother in late August 1997, Daryl was taken into protective custody by Child Protective Services and placed in a shelter. 15R172-73; 20R81-83. Blackthorne could not lawfully obtain custody due to his previous voluntary relinquishment of parental rights, and declined custody when offered it by the police. 15R26-34, 273; 23R122-32; 24R80-85.

Respondent states that Sheila Bellush remarried in 1997. GovtBr. at 2. Bellush remarried in 1993. 15R146-48. Respondent also asserts that in 1997 Bellush "again accused petitioner of sexual abuse," without clarifying that the accusation was a reassertion of the same old allegations made in 1988. Sealed Document 136 at pages 30-33.[3]

Respondent's statement that Blackthorne found Bellush's address in Florida "through a private investigator" is not faithful to the record. GovtBr. at 3. Blackthorne's daughter, Daryl, gave him the address which was

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[3] Sheila accused Blackthorne of sexually abusing Stevie Bellush on three separate occasions in 1988, with each of the underlying alleged events occurring on different dates in 1988. *See* Sealed Document 136 at 30-33. Blackthorne had denied Sheila's false allegations of sexual abuse at the times she made them. They were all ultimately dismissed or simply faded away as unfounded and false. After October 1988, Sheila never accused Blackthorne of committing any new acts of sexual abuse. *Id.* at 33. Rather, she raised those original allegations in subsequent civil litigation whenever it was convenient for her to do so, to wit: in **May 1991, June 1993**, and **June/July 1997**. *See* Sealed Document 136 at 5-6. Moreover, as reflected at page 30, footnote 17 of Sealed Document 136, Sheila also had falsely accused Margaret "Kitty" Murphy, the ex-wife of federal prosecutor John Murphy (the lead prosecutor in this case), of sexual abuse of Stevie while she was living with Blackthorne in 1988, and claimed that Casey Murphy, daughter of John Murphy, was present on one of those occasions.

then verified by Blackthorne's investigator. 20R73-95, 256-57. Respondent strongly implies that Blackthorne sought Bellush's Florida address pursuant to a request from Rocha, after Gonzales and Del Toro had been unsuccessful in locating her. GovtBr. at 3. This misstates the record. Upon learning that Bellush had violated the bond that was posted for her release on the assault charge, Blackthorne began searching for her, initially by contacting the bond company on September 6, 1997 (attempting to have her bond revoked), and then by contacting a Bexar County Sheriff's detective who, upon learning that she had moved (from Blackthorne), attempted to locate her in order to obtain an arrest warrant. 20R8-15; 23R184; 24R122-23, 135; 25R28-55. Before finding Bellush's address, Blackthorne had his investigator contact the Sarasota, Florida, Sheriff in an attempt to facilitate her arrest in Florida. 20R262-64. He had copies made of videotaped news accounts of Bellush's Texas arrest for assaulting Daryl and sent them to persons in Florida who might come into contact with Sheila Bellush, including Jaime Bellush's employer. 19R327-28. He contacted Florida news media in an attempt to encourage broader reportage of Bellush's pending criminal charge in Texas. 20R50; 25R64-76. The record reflects that Blackthorne very openly sought Bellush in an attempt to have her held legally responsible for her assault on Daryl and her flight from Texas. This also reflects ongoing concern on his part for the safety of his daughters. Nothing in the record, except Rocha's testimony, supports a finding that Blackthorne sought Bellush in order to *inflict physical harm on her*.

Rocha, it should be noted, executed a post-trial affidavit recanting his trial testimony. 5R1066 at 1107-1110. Therein, he confirmed that Blackthorne had nothing to do with Sheila's murder, a position he had admitted to immediately after being administered a polygraph (which he failed) during his effort to "cut a deal" with prosecutors in Sarasota, Florida, during his state trial for Sheila's

murder.[4] Rocha's recantation also stated that he had told the Government of Blackthorne's innocence; however he was pressured by the Government (including John Murphy, lead prosecutor herein) to go forward with his perjured testimony. 5R1066 at 1107. Despite Blackthorne's post-trial efforts to litigate this recantation, 5R1066, the motion was denied without a hearing. 5R1049-1059; 5R1064-1065; 1146-1164.

2. Reply to Respondent's Legal Points.

Confrontation Clause Violation: Respondent asserts that the Confrontation Clause challenge to admission of Sheila Bellush's 1987 civil deposition was not before the Court of Appeals. GovtBr.at 8.

Blackthorne objected to the admission of the civil deposition material on the grounds that his attorney at the time of the deposition would not have had the same or similar motive to develop Sheila Bellush's testimony as Blackthorne had during his criminal trial in June 2000 and, therefore, that introduction of the deposition would constitute a violation of the Confrontation Clause. Pet. C.A. Br. 53. Blackthorne directed the appellate court to the place in the record where the trial court overruled his Confrontation Clause objection. *Id.* The Government responded in its brief to the Fifth Circuit panel, "[Appellant] also claims [the deposition's] admission violated his

[4] Rocha had attempted to cut a deal during his state murder trial in Florida, but he failed the questions regarding Appellant's alleged involvement in the offense and thereafter admitted to the polygraph operator that he had lied about Appellant's involvement. 7R211-214. Specifically, Rocha admitted making the following statements prior to this testimony against Blackthorne: "I am the only way they are going to get Allen Blackthorne, and they know that"; "I was willing to tell them what they wanted to hear"; "I was willing to play their game and give the Florida prosecutors Allen Blackthorne on a first-degree murder when I knew it was not a first-degree murder"; "I was willing to give the prosecutors what they wanted even though I knew it wasn't true"; and "I was willing to lie to give them what they wanted." 17R144-146.

confrontation right." Res. C.A. Brief at 50. The Government concluded its argument on the issue, "Because Rule 804(b)(1) is a 'firmly rooted exception' to the hearsay rule, admission of the deposition did not violate Appellant's confrontation right." *Id.* at 52 (citing *United States v. Mann*, 161 F.3d 840, 861 & n.57 (5th Cir. 1998)).

The Government now should be estopped from asserting for the first time and in a way diametrically contrary to its position below that Blackthorne did not allege a Confrontation Clause violation. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). The Government presently is attempting to obtain an "unfair advantage" by making a meritorious point disappear. GovtBr. at 8 n.3 (recognizing that the *Chapman* harmless-error standard is appropriate). *Id.*[6]

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[6] The question of harm under the constitutional standard would need to be decided on remand to the Fifth Circuit panel. The Government asserts that the deposition testimony was merely cumulative of other evidence that Blackthorne made "numerous threats" against Bellush. There are *four alleged threats* in the deposition. If the 1987 deposition had not been admitted, the admissibility of a 1985 threat would have become problematic, leaving only two or three allegations that would have been allowed into evidence, dated in 1990 and 1992. Panel Mot. for Reh'g at 10.

Additionally, one of those threats (Easter 1990) consisted of perjured testimony. Kerry Bladorn testified that on Easter 1990, she and Sheila went to Blackthorne's house because he had the children for Easter and they wanted to visit with the children. During that alleged visit on Easter, Bladorn testified that Blackthorne allegedly made the comment that Sheila should not ever "piss him (Blackthorne) off" because the same thing that had happened to Sue Tuffish (being murdered by her husband) would happen to her. 22R238-239. The divorce decree, GovtEx. 206, reflects that Blackthorne did not have his children on Easter 1990. Blackthorne had his children on the first and third full weekends of each month (i.e., Friday to Sunday). Because Easter 1990 did not fall on the first or third full weekend, he did not have them. This fact was made clear during trial, but lead prosecutor John Murphy nevertheless distorted the dates during his final argument to suggest otherwise. 26R95.

Government's Use of the Sexual Abuse Allegation: Respondent maintains that the evidence that Bellush made sexual-abuse allegations against Blackthorne was not governed under Rule 404(b) – and, therefore, not subject to the rule in *Huddleston v. United States*, 485 U.S. 681, 689 (1988) – because it was offered as evidence of Bellush's, not Blackthorne's, acts. GovtBr. at 9-10. Respondent alleges that the allegations' veracity was not relevant to Blackthorne's motive. *Id.* at 10. This amounts to sleight of hand (at best). Whether or not their veracity was relevant to Blackthorne's motive, the allegations' veracity was very relevant to the prohibited use to which the jury might put them.[7] That is what brings them under the control of Rule 404(b). *See* Pet. 16 ("The question immediately raised. . . ."). Within the evidence there are two distinct levels: (a) the fact that the allegations were made; and (b) the substance of the allegations. The substance is alleged "prior bad acts" by Blackthorne with great promise to convince a jury that Blackthorne killed Bellush in conformity with a depraved character. Respondent wishes to erase Rule 404(b) by conflating the two levels.

The Court's Erroneous Admission of Alleged Prior Sex Abuse for Intent as well as Motive and Erroneous Instruction: In the two counts against Blackthorne, the Government had the burden to prove that he intended to harm Sheila Bellush or have her murdered. 18 U.S.C. § 1958; 18 U.S.C. § 2261(a)(1); 18 U.S.C. § 2(b). Evidence that Bellush and Blackthorne had an acrimonious relationship was relevant to the issue of possible motive. Indeed, Blackthorne offered to stipulate to the acrimonious relationship in return for exclusion of the sex abuse allegations. Sealed Document 136 at 7-8. At the same time, he objected

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[7] The Government felt compelled to examine a total of nine (9) witnesses about the sexual abuse allegations, which obviously created a serious danger of unfair prejudice. *United States v. Ridlehuber*, 11 F.3d 516, 524 (5th Cir. 1990); *United States v. Zabaneth*, 837 F.2d 1249, 1265 (5th Cir. 1988).

strenuously to admission of the sex abuse allegations to prove intent. In order to be relevant to intent, prior bad act evidence must involve an act in which the defendant indulged the same state of mind. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978). Certainly, that was not true of the acts alleged in the sex abuse allegations. They were "entirely outside the sequence of what [Blackthorne was] charged with thinking and doing to commit the [charged offenses]." *Old Chief v. United States*, 519 U.S. 172, 192 (1997). Moreover, the Government all but conceded that the allegations themselves were false, while at the same time preventing Blackthorne from being able to prove that they were false and opposing Blackthorne's requested instructions that they were in fact false.[8] Under such circumstances, admission for *intent* and instruction to the jury that it could consider the allegations for *intent* had to be unfairly prejudicial. *Old Chief*, 519 U.S. at 184; *Beechum*, 582 F.2d at 913-14 (applying Rule 403 as second step of 404(b) analysis). The Government had no need of the sex abuse allegations to prove the intent elements of the charge against Blackthorne, and they had an irrefutable tendency to lead the jury to convict Blackthorne for bad character alone. *Old Chief* alone should require reversal on this ground.[9]

The Government's comment that Blackthorne has not presented this Court with a challenge to the jury

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[8] The Government consistently did not oppose instructions that the allegations should not be considered as true by the jury, but opposed, consistently, Blackthorne's numerous requests that the jury be instructed that they were actually false allegations.

[9] After *Old Chief*, district courts continue to weigh whether defendants have placed intent at issue. *Sedney v. Hasse*, 2002 WL 31108409, at *1 (S.D. N.Y. 2002); *Rashid v. Kuhlman*, 2000 WL 1855114, at *14 (S.D. N.Y. 2000); *United States v. Bruder*, 2000 WL 290269, at *5 (E.D. N.Y. 2000). *See* GovtBr. at 13. In any event, *Old Chief* has nothing to do with the particular reasons for curbing the Government's ability to prove *intent* through prior crimes unless the defendant specifically contests the issue.

instructions on the sexual abuse allegations and intent is totally absurd. GovtBr. at 10 n.4. Blackthorne has charged *before this Court* that the sex abuse allegations were not relevant to his intent and, therefore, that, not only were they inadmissible *for intent*, but it was improper for the trial court to instruct the jury that they were relevant to intent. Pet. 21. Blackthorne's references in the certiorari petition to his brief below were presented merely to show that these arguments which he is making to ***this Court*** were also made to and ignored by the Court below. It is disingenuous (at best) for the Government to suggest that the argument made by Blackthorne at pages 16 to 23 of the certiorari petition (wherein the impropriety of admission and instruction is developed at length) is waived because he cited to pages in his appellate brief.

Respondent's assertion that the district court admitted the sex abuse allegations as probative of motive alone is blatantly incorrect. GovtBr. at 12. Blackthorne described to this Court the district court's Rule 404(b) instruction, which expressly allowed the jurors to consider the sexual abuse allegations as probative of his "state of mind or intent" as well as his "motive to commit the act charged in the indictment." Pet. at 16 (citing 4R795). He also pointed out that the Government urged the district court to admit and instruct on all three reasons. *Id.* at 17. Respondent misrepresents the record (and the holding of the Fifth Circuit panel, which merely ignored the "intent" issue) by limiting the basis for admission to motive. Such limitation might serve Respondent's argument against confusing intent and motive (GovtBr. at 12) if it were true, but it is not!

Respondent asserts that the record does not support Blackthorne's position that he did not place intent in issue. GovtBr. at 12-13 n.5. Respondent relies upon Blackthorne's argument on appeal against sufficiency of the evidence when viewed in a light most favorable to the Government. *Id.* (citing Pet. App. 12). There, Blackthorne argued that the most the record might reflect would be an agreement between conspirators to have Sheila Bellush beaten, not murdered. Pet. C.A. Brief at 22, 27,

29. Blackthorne never has adopted that as a defensive position. His sole defense theory, at trial and now, is general denial that he was involved in the charged conduct at all and/or that he entered any agreement with other conspirators to kill ***or hurt*** Bellush.

Standard of Prejudice for Elicitation of False Testimony: The Government points out that, like the court below, several other circuit courts have conducted plain error review when no objection was made at the time the Government elicited testimony deemed perjurious. GovtBr. at 15. This improperly allows the Government to intentionally corrupt the truth-seeking process with false testimony almost anytime that testimony is not invited, initially introduced, or otherwise stipulated to by the defense. It is hard to understand why the defense's correction of false testimony on cross-examination is equivalent to forfeiture of a point of error. The defense should not be penalized for this kind of strategic choice as to *how* it reveals the Government's elicitation of false testimony. In any event, when the unrepentant Government not only intentionally elicits false testimony (which the instant facts ineluctably prove), but also proceeds to rehabilitate the false testimony after the defense has revealed it to be false, reversal should ensue under the *Agurs* standard of materiality. *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991) (reversing under *Agurs* where Government elicited false testimony and attempted rehabilitation following its impeachment). It is ludicrous for Respondent to assert that the "government did not allow false testimony to go uncorrected before the jury" in Blackthorne's case. Not only was it obvious that the Government knew the evidence was false when it presented it, but the Government attempted rehabilitation of the evidence by covering up its falsity in closing argument. GovtBr. at 16; *see Wallach*, 935 F.2d at 457.

Respectfully submitted,

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